U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel Winslow for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO). The AAO subsequently dismissed the appeal. The petitioner has now filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. §103.5. The motion will be dismissed pursuant to 8 C.F.R. 103.5(a)(2) and 103.5(a)(4).

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has resubmitted evidence with this motion that was originally submitted on appeal. As the petitioner had previously submitted evidence filed on motion, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Even if the AAO were to consider counsel's assertions on motion and the September 10, 2012 occupational evaluation from [redacted] for [redacted] resubmitted on motion; the statements made by the evaluator cannot be substantiated by any evidence contained in the record. As noted on appeal, the evaluator stated that, based upon his review of the evidence concerning the beneficiary's employment and work experience, the beneficiary's previous job experience is directly relevant to the position of Senior Mechanical Engineer, and that the jobs are closely related, regardless of the variance in titles.[2] The AAO notes that the evaluator does not go into great detail as to how he reached his conclusions. Contrary to the evaluator's claims, the evidence in the record is inconsistent, contradictory, and unable to establish that the job duties performed by the beneficiary were substantially similar to the job duties as described in the labor certification. USCIS uses an evaluation as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

[2] The evaluator stated that, although the declarant in a letter of employment provided by [redacted] stated that the beneficiary's title was senior project engineer, the position title is irrelevant because his job duties performed were indicative of a bachelor's degree level of mechanical engineering work. The evaluator also stated that a person who is qualified to work as a senior project engineer is also qualified to work as a senior mechanical engineer because both positions require the application of very similar principles and techniques, skillsets, and knowledge.

of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the petitioner has not demonstrated that the evaluator's statement is based upon reliable evidence; in that the information provided in the employment statements submitted by the petitioner contradict each other and the statements conflict with the beneficiary's sworn statements on the ETA Form 9089. The job duties, job titles, and periods of time during which the beneficiary held certain positions change from one letter to the next. Crucially, the beneficiary is not described as having designed and planned mechanical systems for a 60 month period. In addition, the petitioner has failed on motion to address the inconsistencies and contradictions contained in the statements made by declarant of Moreover, the description of the beneficiary's work experience in the letters is inconsistent, contradictory, and somewhat vague, so it does not establish that he has the required work experience in the job offered. 8 C.F.R § 204.5(g)(1). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 9, 2008. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In addition, the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). As noted on appeal, the proffered wage is $102,000.00 per year and the priority date is January 9, 2008. The petitioner did not submit evidence that it paid wages to the beneficiary in 2008, and the petitioner's income tax return demonstrates its net income of -$4,772.00 and net current assets of -$94,610.00 which were not equal to or greater than the proffered wage for 2008. The petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, and net current assets. Although the petitioner's owner makes an offer of his officer's compensation to pay the proffered wage, it has not been established that he could have afforded to take a cut in his own wages. For this additional reason, the motion will be dismissed.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.